BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

MARSHA I	KIRSCHBAUM Claimant)	
VS.)	
USD 375	Respondent)	Docket No. 1,043,255
AND)	
ACCIDENT FUND NATIONAL INS. CO. Insurance Carrier)))	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the December 17, 2008, Order for Production of Records entered by Administrative Law Judge John D. Clark. Roger A. Riedmiller, of Wichita, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

Issues

The Administrative Law Judge (ALJ)'s Order for Production of Records compels the production of claimant's medical records, bills, statements, reports and accounts, other than those records specifically excluded in 42 C.F.R. 2.1 *et. seq.* There was a conference call with the ALJ, but no hearing was held and no record was made in connection with respondent's request for the order.

Claimant requests review of the Order for Production of Records, contending that the order does not comply with 45 C.F.R. §164.512(e) and HIPAA in general. Claimant requests the Board find that the following language must be included in the order:

HIPAA does not authorize ex parte contacts with healthcare providers. This order prohibits the use or disclosure of the claimant's medical records and information for any non-litigation purpose. Any oral contact by respondent or its respresentatives [sic] with claimant's healthcare providers shall be preceded by writen [sic] notice to

claimant or claimant's counsel giving them the opporutnity [*sic*] to object to the ex parte oral contact and such notice shall be given a minimum of seven (7) days. Email or fax notiifciation [*sic*] will suffice. HIPAA ase [*sic*] set forth in 45 CFR § 164.512(e). See <u>Crenshaw v. MONY Life Ins. Co.</u>, 318 F.Supp.2d 1015, 1029 (S.D.Cal. 204) and Austin v. Moreland, 288 Ga.App. 270 (653 SE2d 347) (2007).

Respondent argues that 45 C.F.R. § 164.512(I) states:

A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.²

Respondent further asserts that claimant's construction of HIPAA is too onerous for workers compensation cases, arguing that respondents are involved in the selection of the treating physician, direct claimant's medical treatment, and directly pay for claimant's medical treatment. Respondent argues that, therefore, respondents should not have to provide notice to question a bill or see whether a report has been generated. Further, respondent contends that claimant's proposed language would prevent a respondent from communicating with its own medical expert, jeopardizing the sanctity of attorney work product. Accordingly, respondent requests the Board deny claimant's appeal of the ALJ's Order for Production of Medical Records.

The issues for the Board's review are:

- (1) Does the Board have jurisdiction over the issue in this appeal?
- (2) Is there a sufficient evidentiary record for the Board to conduct a meaningful review?
- (3) If so, should the HIPAA language as set out by claimant be included in the Order for Production of Medical Records?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a review of the file and the arguments presented in the briefs to the Board, the Board finds and concludes that it does not have an adequate record to review the ALJ's Order for Production of Medical Records.

K.S.A. 2008 Supp. 44-551(i)(1) limits the Board's jurisdiction to review of "final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and

¹ Claimant's Brief at 1 (filed Jan. 12, 2009).

² Respondent's Brief at 2 (filed Jan. 29, 2009).

amendments thereto made by an administrative law judge " The ALJ's Order for Production of Medical Records is interlocutory in nature. Nevertheless, it may be treated as a final order if it reserves no further question and the issues cannot be adequately reviewed at the time of the final award.³

The Board is not granted original jurisdiction over workers compensation issues but is limited to considering issues initially decided by an administrative law judge.⁴ K.S.A. 2008 Supp. 44-555c(a) limits the Board's review to "questions of law and fact as presented, had and introduced before the administrative law judge." In following that mandate, the Board finds that claimant has failed to make a record that shows she made a timely objection to the proposed order or what relief was sought from the ALJ to that order.⁵

WHEREFORE, it is the finding, decision and order of the Board that claimant's appeal of the Order for Production of Medical Records of Administrative Law Judge John D. Clark dated December 17, 2008, is hereby dismissed.

IT IS SO ORDERED.		
Dated this day of March, 2009.		
	BOARD MEMBER	
	BOARD MEMBER	
	BOARD MEMBER	

Roger A. Riedmiller, Attorney for Claimant
 Douglas C. Hobbs, Attorney for Self-Insured Respondent
 John D. Clark, Administrative Law Judge

³ See *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982); *Rhodeman v. Moore*, Docket No. 234,890, 1999 WL 1008029 (Kan. WCAB Oct. 12, 1999).

⁴ K.S.A. 2008 Supp. 44-555c(a).

⁵ See, e.g., Crease v. Vezers Precision Industrial Constructors International, Docket No. 1,035,775, 2007 WL 4662039 (Kan. W CAB Dec. 12, 2007); Laverentz v. Sedgwick County, Docket No. 1,017,534, 2004 WL 3089882 (Kan. W CAB Nov. 19, 2004).